Office Supreme Court, U.S.
FILED
MAR 5 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 895

WILLIAM FISHER,

Petitioner,

vs.

THE CITY OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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March 4, 1963

SUBJECT INDEX.

	PAGE
I. Opinions below	1
II. Grounds on which jurisdiction is invoked	2
III. Questions presented for review	2
IV. Constitutional provisions, statutes and regulations involved	3
V. Statement of the case	3
VI. Reasons relied on for allowance of the writ	7
(a) The lower courts were plainly wrong in holding that this is a Civil Rights Act case which cannot be maintained under *Monroe* v. *Pape*, 365 U. S. 167	7
(b) Since 1875 there have been parallel but separate and independent jurisdictional acts conferring original federal court jurisdiction	9
(c) The Second Circuit Court of Appeals decided petitioner's Constitutional claim in a way contrary to applicable decisions of this Court and of the Courts of Appeal for the Seventh, Eighth and Ninth Circuits	11
(d) A municipality can not bar assertion of a federal Constitutional claim against it by interposing its own administrative time limitation for commencing suit	14
(e) State court limitations can not control the assertion of a federal Constitutional right in a federal court sitting in the state	18
VII. Conclusion	18
Appendix:	
Constitutional Provisions, Statutes and Regulations Involved	21
Opinion and judgment of the District Court	24
Opinion of the Court of Appeals	24
Judgment of the Court of Appeals	26
Order staying mandate	27

TABLE OF CASES.

	PAGE
Adams v. *City of Park Ridge*, 293 F(2) 585, 587 (CA 7, 1961)	13
Agnew v. *City of Compton*, 239 F(2) 226, 229 (CA 9, 1957)	13
Am. Federation of Labor v. *Swing*, 312 U. S. 231, 324, 715	12
Angel v. *Bullington*, 330 U. S. 183, 192	18
Baker v. *Carr*, 369 U. S. 186, 199	10
Barnes v. *Kansas City Office of the FBI*, 185 F(2) 409, 411 (CA 8, 1950)	13
Bell v. *Hood*, 327 U. S. 678, 681	8, 10, 11, 13, 16
Cooper v. *Aaron*, 358 U. S. 1, 16-19	10, 15
Dann v. *Studebaker-Packard Corp.*, 288 F(2) 201, 211 (CA 6, 1961)	14
Eagan v. *City of Aurora*, 365 U. S. 514	11
Erie R. Co. v. *Tompkins*, 304 U. S. 64	15
Fisher v. *City of New York*, 208 FS 681, 682; 311 F(2)	5, 11, 15
Fisher v. *State*, 20 N. Y. Misc. (2) 818, 819; 23 N. Y. Misc. (2) 935; 13 N. Y. A. D. (2) 608; 10 N. Y. (2) 60	4, 15
Glus v. *Brooklyn Eastern District Terminal*, 359 U. S. 231	17
Hague v. *C. I. O.*, 307 U. S. 496, 507	8, 9, 17
Harmon v. *Superior Court*, 307 F(2) 796, 798 (CA 9, 1962)	13
Hart v. *Keith Vaudeville Exchange*, 262 U. S. 271, 274	10
Hicks v. *City of Los Angeles*, 240 F(2) 495, 497 (CA 9, 1957)	13
Hoffner v. *New York*, 207 N. Y. Misc. 1070, 1072	7, 18
Holmberg v. *Ambrecht*, 327 U. S. 392	18

PAGE

Home Tel. & Tel. Co. v. *Los Angeles*, 227 U. S. 278, 286 ..... 10, 12, 17

Insurance Co. v. *Wilkinson*, 13 Wall. 222, 233 17

Johnson v. *Eisentrager*, 339 U. S. 763, 797 (dissenting opinion) 12

Lowe v. *Manhattan Beach City School District* 222 F(2) 258, 259 (CA 9, 1955) 13

Mainelli v. *Providence Journal Co.*, 201 FS 7, 9 (D. C. R. I. 1961) 14

Malinsky v. *New York*, 324 U. S. 401 5

McAllister v. *Magnolia Petroleum Co.*, 357 U. S. 221, 227-9 18

Monroe v. *Pape*, 365 U. S. 167, 187-192, 252 ..... 5, 8, 9, 11

People v. *Fisher*, 4 N. Y. A. D. (2) 1011; 4 N. Y. (2) 943; 23 N. Y. Misc. (2) 391 ..... 3, 4

Schroeder v. *Young*, 161 U. S. 334 17

Shaffer v. *Jordan*, 213 F(2) 393, 396-7 (CA 9, 1954) 11, 12

Shelley v. *Kraemer*, 334 U. S. 1, 14-18 12

Spampinato v. *City of New York*, 311 F(2) 11, 14

Spielman Motor Co. v. *Dodge*, 295 U. S. 89, 92-5 ..... 4, 16, 17

Stamphill v. *Johnston*, 136 F(2) 291, 292 (CA 9, 1943) 6

Sterling v. *Constantin*, 287 U. S. 378; 393 15

Swafford v. *Templeton*, 185 U. S. 487, 491-492 ..... 8, 10

The Fair v. *Kohler Die Co.*, 228 U. S. 22, 25 8

United States v. *Raines*, 362 U. S. 17, 25 ..... 10, 12

United States v. *Williams*, 341 U. S. 58, 66 14

Western Pacific RR Corp. v. *Western Pacific RR Co.*, 345 U. S. 247, 270 6

Wheeldin v. *Wheeler*, 280 F(2) 293, 294 (C. A. 9, 1960) 13

Wiley v. *Sinkler*, 179 U. S. 58, 64-5 ..... 8, 10

Table of Statutes.

	PAGE
Constitution of the United States:	
4th Amendment	6, 12
5th Amendment	6, 12, 13
14th Amendment, Sec. 1	2, 3, 5, 6, 7, 10, 11
Federal Rules of Civil Procedure:	
Rule 8(c)	7, 14
Rule 9(f)	14
Rule 12(b)(6)	5, 14
New York City Administrative Code, Sec. 349a1.0	3, 5, 7, 15
New York Civil Practice Act, Sec. 50(1) (N. Y. L. 1930, ch. 925)	3, 5, 7, 15
New York Court of Claims Act, Sec. 8 (N. Y. L. 1939, ch. 810)	4
New York General Municipal Law, Sec. 50-e (N. Y. L. 1945, ch. 694, §1; L. 1950, ch. 481)	3
United States Code:	
28 U. S. C. Sec. 1254(1) (62 Stat. 928)	2
Sec. 1331(a) (72 Stat. 415)	2, 3, 5, 7, 9, 10
Sec. 1343(3) (62 Stat. 932)	2, 3, 7, 10, 11
42 U. S. C. Sec. 1983 (R. S. Sec. 1979) (17 Stat. 13)	5, 10, 11

Table of Texts.

1-A Barron & Holtzoff: Federal Practice & Procedure, 187	14
66 Harvard Law Review, 1285, 1288	8

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

I. OPINIONS BELOW.

The opinion of the District Court for the Southern District of New York dismissing petitioner's complaint for want of jurisdiction is reported in 208 F. S. 681. The *per curiam* affirmance of the Second Circuit Court of Appeals is reported in 311 F(2). —They are printed at p. 16a of the record and p. 24 of the appendix hereto respectively.

II. GROUNDS ON WHICH JURISDICTION IS INVOKED.

(1) The judgment of the Court of Appeals sought to be reviewed was dated and entered on January 24, 1963.

(2) Rehearing was not sought. On February 19, 1963 the Court of Appeals granted a 30-day stay of its mandate to facilitate the filing of this petition.

(3) The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U. S. C. Sec. 1254(1).

III. QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the Second Circuit Court of Appeals has has determined, contrary to prior decisions of this Court and of the Seventh, Eighth and Ninth Circuit Courts of Appeal, that petitioner does not have a cognizable damage claim against the respondent municipality under the 14th Amendment, Section 1 and 28 U. S. C. Sections 1343(3) and 1331(a);

(2) Whether a municipality can administratively impose its own time limitation against the assertion of a federal Constitutional claim in a federal court, particularly where such limitation expired while petitioner was diligently pursuing his remedy against the state in justified reliance upon a prior decision of this Court that the District Attorney responsible for petitioner's void conviction and eleven year incarceration was an agent of the state and not of the municipality until the highest state court had, for the first time, decided otherwise.

IV. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED.

These are: The 14th Amendment to the Constitution of the United States, Section 1; 28 U. S. C. Sections 1331(a) and 1343(3); 42 U. S. C. Section 1983; New York Civil Practice Act (Clevenger ed.), Section 50(1); New York General Municipal Law (McKinney ed.), Section 50-e; Administrative Code of the City of New York, Section 349a1.0, set forth in the appendix to this petition.

V. STATEMENT OF THE CASE.

In 1933 petitioner was convicted in the New York City Court of General Sessions of the state crime of first-degree manslaughter and sentenced to 15 to 30 years in a state penitentiary. In October, 1944, after eleven years of incarceration, he was released by the state parole board and placed on parole until October, 1963. Following his release petitioner moved in General Sessions for a vacatur of his conviction[1]. His motion was denied and the denial affirmed by the Appellate Division of the New York Supreme Court (*People* v. *Fisher*, 4 N. Y. A. D. (2d) 1011). However, on a further appeal, the New York Court of Appeals reversed and remanded for a hearing on the facts (*id.*, 4 N. Y. (2d) 943). Following such hearing petitioner's motion was granted at the Court of General Sessions and his conviction vacated on the grounds it was improper because of deprivation at his trial of his Constitutional right to due process

[1] Three years after petitioner's conviction the Assistant District Attorney swore that the gun identified at the trial as Fisher's was not his. It was also established that this prosecutor suppressed at the trial the testimony of two police officers which placed petitioner away from the scene of the crime; also that the bullet could not have been fired by Fisher (*People* v. *Fisher*, 23 N. Y. Misc. (2d) 391).

of law (*People* v. *Fisher*, 23 N. Y. Misc. (2d) 391). On December 24, 1958 the original indictment was dismissed on consent of the District Attorney for New York County (legally and geographically a part of New York City).

This Court had, in 1935, in *Spielman Mofor Co.* v. *Dodge*, 295 U. S. 89, 92-5[2], squarely held that a New York County District Attorney, in enforcing state criminal laws, was a state officer performing a state and not a local function. On January 8, 1959 petitioner accordingly filed in the state Court of Claims[3] his claim for compensation against the state for damages for his unlawful conviction and eleven year incarceration. The Court of Claims dismissed petitioner's complaint for defects in pleading, with leave to amend, noting "The claimant may well have a cause of action against the State. Sympathetically, we say that he should have" (*Fisher* v. *State*, 20 N. Y. Misc. (2d) 818, 819). However, it thereafter dismissed the amended complaint on the ground the District Attorney responsible was not an officer of the State but of the respondent City (*id.* 23 N. Y. Misc. (2d) 935). This decision was affirmed by the Appellate Division (*id.*, 13 N. Y. A. D. (2d) 608) and by the New York Court of Appeals, the highest state court (*id.*, 10 N. Y. (2d) 60) which expressly declined to follow *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, 92-5.

Thereafter the New York Legislature passed an Act authorizing the state Supreme Court to take jurisdiction of petitioner's claim against the City. On April 24, 1962 this Act was vetoed by the Governor in a message stating the veto had been urged by the Mayor of the respondent City

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[2] Opinion by Chief Justice Hughes, a former Governor of New York.

[3] Pursuant to the N. Y. Court of Claims Act, Sec. 8 (N. Y. L. 1939, Ch. 810).

on the ground "There is no moral or legal obligation on the part of the City to compensate the claimant," a conclusion which the District Court below strongly disapproved.[4]

Petitioner, rightfully believing he had exhausted his state remedies, judicial, legislative and executive, then instituted this action in the District Court for the Southern District of New York on June 20, 1962, expressly alleging federal jurisdiction under 28 U. S. C. Sec. 1343, a cause of action against the City for deprivation of his liberty and civil rights, including personal suffering, degradation and impairment of reputation, mental anguish and loss of income, without due process of law in violation of the 14th Amendment, Section 1 to the Constitution of the United States and damages in excess of the jurisdictional minimum prescribed by 28 U. S. C. Sec. 1331(a). On July 9, 1962 the respondent City appeared generally and moved pursuant to F. R. C. P. 12(b) (6) for dismissal of the complaint "for failure to state a claim upon which relief can be granted", although actually moving on its attorney's affidavit claiming that petitioner's cause of action was then affirmatively barred by two alleged local statutes of limitation of one and two years respectively.[5]

On September 20, 1962 the District Court (Bonsal, D. J.) in an opinion (208 F. S. 684) dismissed the complaint for "lack of jurisdiction" on the ground that it was an action under the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983, R. S. Sec. 1979) which could not be maintained against a municipality under the rule of *Monroe* v. *Pape*, 365 U. S.

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[4] *Fisher* v. *City of New York*, 208 FS 681, 682. On a constitutional claim to denial of due process this Court will look at the whole sequence of state action (Frankfurter, J., in *Monroe* v. *Pape*, 365 U. S. 167, 259, citing *Malinski* v. *New York*, 324 U. S. 401, and other cases.)

[5] *N. Y. City Administrative Code, Sec. 349a 1.0* providing for a general limitation of one year on all suits against the City; *N. Y. Civil Practice Act, Sec. 50[1]* imposing a two year limitation on suits for false imprisonment under state law (N. Y. L. 1920, ch. 925).

167, 487-92. On Janaury 24, 1963 the Court of Appeals for the Second Circuit affirmed *per curiam*: (1) on the ground stated below and (2) for alleged failure to state a cause of action under the 14th Amendment, Sec. 1, citing *Bell* v. *Hood*, 327 U. S. 678, where, *on the contrary*, a complaint based "squarely" on the 5th and 4th Amendments and asking damages against federal officials *was sustained* by this Court. Rehearing was not applied for.[6]

During all of the time petitioner was diligently pursuing his rights in the state courts in the justified belief that he had been unlawfully indicted, convicted and incarcerated by agencies of the state (this court had held the District Attorney was a "state" official, the indictment and prosecution were in the name of the "People of the State of New York", petitioner's eleven year incarceration occurred in a "state" penitentiary and he was then placed on nineteen years parole by a "state" parole board), the state opposed his claim to compensation on the ground that it was a liability only of the City, until after the claimed local statutes of limitation in favor of the City had expired. Then, when petitioner secured a jurisdictional Act enabling him to proceed against the City in the state courts, the City itself procured a veto on the ground it had "no moral or legal obligation" toward petitioner. Then, having exhausted all state remedies, judicial, legislative and executive, when petitioner turned to the federal courts for the enforcement of his plain federal Constitutional rights under the 14th Amendment the respondent City sought dismissal of his complaint, *not* on the alleged ground of "lack of jurisdiction", raised *sua sponte* by the courts below directly

[6] It would have been futile in view of the *per curiam* opinion that petitioner's claim was "patently without merit." See the concurring opinion of Mr. Justice Frankfurter in *Western Pacific RR Corp.* v *Western Pacific RR Co.*, 345 U. S. 247 at 270; *Stamphill* v. *Johnston*, 136 F (2) 291, 292 (CA 9, 1943).

in the face of the allegations of the complaint itself, but on the alleged claim that plaintiff is *now* barred by two alleged local statutes of limitation of one and two years respectively (*City of New York Administrative Code*, Sec. 394a-1.0; *N. Y. Civil Practice Act*, Sec. 50(1)). Seldom if ever has a stronger case been established for an estoppel to plead a local "statute" of limitations, assuming *arguendo* of course that such local restrictions can be applicable matters in affirmative defense (under F. R. C. P. 8(c)) to a suit grounded on the 14th Amendment and its concomitant jurisdictional acts (28 U. S. C. Secs. 1343, 1331) wherein no such limitations are contained or made applicable.

VI. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

(a) The lower courts were plainly wrong in holding that this is a Civil Rights Act case which can not be maintained under *Monroe* v. *Pape*, 365 U. S. 167.

Although the complaint plainly averred this suit was brought solely and squarely on the 14th Amendment, Section 1 and its implementing jurisdictional statute (28 U. S. C. Sec. 1343(3)) and although the requisite jurisdictional amount was both expressly averred (28 U. S. C. Sec. 1331(a)) and is plainly inherent in the cause of action itself, involving deprivation of liberty and civil rights for eleven years without due process, with consequent "degradation and impairment of reputation, mental anguish, loss of income and the cost of litigation"[7] to invalidate the void judgment of conviction, the District Court, by some inexplicable metabasis, transformed the cause of action pleaded

[7] See *Hoffner* v. *New York*, 207 N. Y. Misc. 1070, where a similar false imprisonment for approximately the same period was compensated in the sum of $112,290.

into one brought under the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983, R. S. Sec. 1979) and then dismissed it under the rule of *Monroe* v. *Pape*, 365 U. S. 167, which decided only that an action under that Act can not be maintained against a municipality since the latter is not a "person" as that term was intended in the Act, as plainly appears from the Act's legislative history (365 U. S. 161, 187-192).[8]

The courts below are plainly and demonstrably wrong in this respect. It was up to the petitioner to choose his own cause of action (*Bell* v. *Hood*, 327 U. S. 678, 681; *The Fair* v. *Kohler Die Co.*, 228 U. S. 22, 25; *Wiley* v. *Sinkler*, 179 U. S. 58, 64-65; *Swafford* v. *Templeton*, 185 U. S. 487, 491-492) not for the courts below to impose upon him, for dismissal purposes, one that manifestly could not be maintained under the prior decisions of this Court.

To fortify its conclusion the District Court cited a law review note: "The Proper Scope of the Civil Rights Act", 66 Harvard L. R. 1285. However, even this makes clear that for a damage suit on the federal Constitution, as here, there must be present a requisite jurisdictional amount of over $10,000 (28 U. S. C. Sec. 1331 (a)) whereas the Civil Rights Act suit (42 U. S. C. Sec. 1983) involves rights that are not readily susceptible of monetary valuation and which may be far below this jurisdictional minimum (66 Harvard L. R. 1285, 1288, citing *Hague* v. *C. I. O.*, 307 U. S. 496, 531).

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[8] "Before the Court . . . petitioners have limited their claim to recovery to the liability imposed by (R. S.) Sec. 1979. Accordingly only that Section is before us." (*Monroe* v. *Pape*, 365 U. S. 167 at 170).

(b) Since 1875 there have been parallel but separate and independent jurisdictional acts conferring original federal court jurisdiction.

The Civil Rights Act (17 Stat. 13) was enacted April 20, 1871 to meet the Ku Klux Klan menace in the Reconstruction era when state laws protecting the rights of citizens were not enforced (*Monroe* v. *Pape*, *supra*, 365 U. S. 167, 171, 187) and it was aimed at "persons", not municipalities (*Id.*). Not until March 3, 1875, four years later, were federal courts given original jurisdiction of civil suits arising directly under the federal Constitution, provided the amount involved in damage suits exceeded a stated minimum (18 Stat. 470, now 28 U. S. C. Sec. 1331). This is made plain in the opinions of Justices Roberts and Stone in *Hague* v. *C. I. O.*, *supra*, 307 U. S. 496, 507, 527-33, setting forth the history of this legislation.

These opinions establish that since 1875 there have been two jurisdictional acts, one conferring original jurisdiction on district or circuit courts to entertain suits for damages arising under the Constitution or laws of the United States wherein the amount in controversy exceeds a specified value; the other conferring jurisdiction on equity suits authorized by the Civil Rights Act to protect rights or immunities, regardless of the amount in controversy and which may have little, if any, ascertainable pecuniary value. This is also made plain in the dissenting opinion of Mr. Justice Frankfurter in *Monroe* v. *Pape*, 365 U. S. 167 at 252, pointing out that until the Act of 1875 there was no original "federal question" jurisdiction in the federal courts. Thus it is plain that petitioner's suit on the 14th Amendment could not be grounded on the Civil Rights Act of 1871, nor was it grounded on that Act.

"It was up to the plaintiff to decide how he sues" (*Bell v. Hood, supra*, 327 U. S. 678, 681). Petitioner here made it as plain as it is possible to do that his complaint was based upon the Fourteenth Amendment and the jurisdictional acts (28 U. S. C. Sec. 1331, 1343) *not* on the Civil Rights Act of 1871 (42 U. S. C. Sec. 1983). The test is the sum claimed in good faith (*Hague v. C. I. O., supra*, 307 U. S. 496, 507; *Wiley v. Sinkler*, 179 U. S. 58; *Swafford v. Templeton*, 185 U. S. 487). This clearly appears in the complaint, hence the conclusion of the District Court, affirmed by the Court of Appeals, that plaintiff's action is a claim "under 42 U. S. C. Sec. 1983" (the Civil Rights Act) is demonstrably wrong. Petitioner's suit is "directly on the Constitution" and the alleged violations of the Fourteenth Amendment are not immaterial but form rather the sole basis for the suit (*Bell v. Hood, supra*, 327 U. S. 678, 681, 683). The reach of the Fourteenth Amendment is coextensive with any exercise by a state of power, in whatever form exerted, and it is immaterial that the state authorized the wrong or that the actions in question are those of its municipality (*Home Tel. & Tel. Co. v. Los Angeles*, 227 U. S. 278, 286). Every local official is bound by the 14th Amendment (*United States v. Raines*, 362 U. S. 17, 25; *Cooper v. Aaron*, 358 U. S. 1, 16-19). Thus dismissal of the complaint upon the ground of "lack of jurisdiction" in a suit under the 14th Amendment would only be justified if petitioner's claim were "so attenuated and unsubstantial as to be absolutely devoid of merit or frivolous" (*Baker v. Carr*, 369 U. S. 186, 199; *Bell v. Hood, supra*, 327 U. S. 678, 683). "That the claim is unsubstantial must be 'very plain'" (*Baker v. Carr, supra; Hart v. Keith Vaudeville Exchange*, 262 U. S. 271, 274). Plainly a claim for eleven

years loss of liberty and civil rights under a void judgment of conviction, since vacated, is a substantial federal Constitutional claim. As the District Court held:

> "On the facts stated, it seems most unfortunate that this plaintiff, having once been denied due process and serving eleven years in the penitentiary as a result, can not be provided a forum in which to assert his claim for compensation for his detention" (208 F. S. 681, 682).

(c) The Second Circuit Court of Appeals decided petitioner's Constitutional claim in a way contrary to applicable decisions of this Court and of the Courts of Appeal for the Seventh, Eighth and Ninth Circuits.

The Second Circuit Court of Appeals, in its two paragraph *per curiam* affirmance, rendered only six days after submission, affirmed "for lack of jurisdiction" the decision below "Insofar as plaintiff's claim . . . is based upon 28 U. S. C. Section 1343(3) and 42 U. S. C. Section 1983", citing *Monroe* v. *Pape*, *supra*, 365 U. S. 167; *Eagan* v. *City of Aurora*, 365 U. S. 514 and its own recent decision in *Spampinato* v. *City of New York*, 311 F(2) [illegible]. But petitioner's claim is not "based upon" 42 U. S. C. Sec. 1983 at all, thus the cited decisions, involving solely Civil Rights Act cases and determining merely that municipalities are not "persons" within the intendment of that Act, as disclosed by its legislative history, are without relevancy here.

Correctly treating petitioner's claim as one directly based on the 14th Amendment, Section 1, the Court of Appeals then dismissed it (apparently on the merits) on the supposed authority of *Bell* v. *Hood*, 327 U. S. 678 and *Shaffer* v. *Jordan*, 213 F(2) 393, 396-7 (C. A. 9, 1954). But *Bell* v. *Hood* was a damage suit against federal agents

under the 5th and 4th Amendments for an illegal search, seizure and arrest wherein decisions of the two lower courts dismissing the complaint were reversed and it was reinstated by this Court in a powerful opinion since followed in the other Circuits. And in *Shaffer* v. *Jordan*, although federal jurisdiction was there upheld, a complaint for declaratory relief relating to an election was dismissed as not stating a cause of action against the California Secretary of State, it appearing that his actions complained of were in fact lawful under California state law and that plaintiffs were not deprived of any rights thereby. That, of course, is the exact converse of the situation here. The New York courts voided petitioner's unlawful conviction on the ground that he had been denied due process. Then, having recognized the initial wrong done petitioner, New York proceeded further to deny him due process by refusing him a forum wherein he could assert his claim to redress under applicable state law. The respondent City, by its Mayor, admittedly administered the final *coup* in this connection by securing its veto, after a jurisdictional Act for petitioner's relief had passed both houses of the state legislature, on the ground it owed "no moral or legal" duty to petitioner. The reach of the 14th Amendment "is coextensive with any exercise by a State of power, in whatever form exercised" (*Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*, 227 U. S. 278, 287) and every state official, high and low, is bound by it (*United States* v. *Raines*, *supra*, 362 U. S. 17, 25). Even a state court judgment which denies due process constitutes "state action" within the purview of the 14th Amendment and may in itself deprive a litigant of due process of law (*Johnson* v. *Eisentrager*, 339 U. S. 763, 797; *Am. Federation of Labor* v. *Swing*, 312 U. S. 321, 324, 715; *Shelley* v. *Kraemer*, 334 U. S. 1, 14-18).

The rule of *Bell v. Hood* has, of course, been followed in numerous Circuit Court decisions. In *Louie* v. *Manhattan Beach City School District*, 222 F. (2) 258, 259 (C. A. 9, 1955), a suit for damages for the conversion of real and personal property was sustained under the 14th Amendment and 28 U. S. C. Sec. 1331; in *Barnes* v. *Kansas City Office of the F. B. I.*, 185 F. (2) 409, 411 (C. A. 8, 1950), a suit for a declaratory judgment was dismissed because plaintiff had an adequate remedy for damages against federal agents under the 5th Amendment and the rule of *Bell* v. *Hood*; in *Agnew* v. *City of Compton*, 239 F. (2) 226, 229 (C. A. 9, 1957), it was held that a suit under the Constitution for more than the jurisdictional minimum could be maintained under 28 U. S. C. Sec. 1331; in *Adams* v. *City of Park Ridge*, 293 F (2) 585, 587 (C. A. 7, 1961), equitable causes of action were held cognizable under the 14th Amendment and 28 U. S. C. Sec. 1343(3); in *Harmon* v. *Superior Court*, 307 F. (2) 796, 798 (C. A. 9, 1962), it was held error to dismiss a complaint alleging deprivation of rights under the federal Constitution, regardless of how unsubstantial they may be claimed to be, and that the right to a hearing on the matter in a federal court "is of the essence of our judicial system" (p. 798); in *Wheeldin* v. *Wheeler*, 280 F. (2) 293, 294 (C. A. 9, 1960), jurisdiction was upheld to entertain a federal Constitutional claim for damages against a Congressional investigating agent; in *Hicks* v. *City of Los Angeles*, 240 F. (2) 495, 497 (C. A. 9, 1957) jurisdiction of a damage suit under the 14th Amendment based on a wrongful discharge from employment with a resulting denial of due process was upheld.

All these cases follow the rule of *Bell v. Hood*, *supra*. There can not be one rule in the Second Circuit and another elsewhere as regards a citizen's rights under the 14th

Amendment. See also *United States* v. *Williams*, 341 U. S. 58, 66, restating that a District Court could determine on the merits a damage suit brought under the federal Constitution; *Dann* v. *Studebaker-Packard Corp.*, 288 F(2) 201, 211 (C. A. 6, 1961); *Mainelli* v. *Providence Journal Co.*, 201 F. S. 7, 9 (D. C. R. I. 1961).

(d) A municipality can not bar assertion of a federal Constitutional claim against it by interposing its own administrative time limitation for commencing suit.

While the District Court, in dismissing the complaint under F. R. C. P. 12(b)(6) as not stating a cause of action of which it had jurisdiction under the Civil Rights Act, did not reach the question of the "statute" of limitations, if any, applicable to a suit under the federal Constitution, the Court of Appeals based its *per curiam* affirmance in part on its own then unreported decision in *Spampinato* v. *City of New York*, *supra*, 311 F(2) , where a Civil Rights Act suit was held barred by an unspecified[9] "New York Statute of Limitations". And since the same question was raised below by the respondent City it should be settled here.

Although F. R. C. P. 8(c) specifically requires such defense be affirmatively pleaded by way of answer some Circuit Courts now hold that F. R. C. P. 9(f), making averments of time material in testing the sufficiency of a complaint, permits the dismissal of a complaint under F. R. C. P. 12(b)(6) that on its face is barred by limitations (*1-A Barron & Holtzoff: Federal Practice & Procedure*, p. 187 and collected cases). This question has never been decided by this Court. It should be now,

[9] There are 52 sections in the New York Civil Practice Act dealing with limitation of actions brought under state law (N. Y. L. 1920, ch. 925, Article 2 "Limitations of time".)

At the outset it may be restated that federal jurisdiction here is not grounded on diversity of citizenship, hence the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, is inapplicable. Moreover, this is not a suit for false imprisonment under state law, hence the New York two year statute of limitations in such suits (Civil Practice Act, Sec. 50(1)), is inapplicable to a suit under the 14th Amendment.

The respondent City, however, urged below its own self erected administrative code limitation of one year[10] for the commencement of actions against it from the date of their accrual, here admittedly on December 28, 1958 when the City finally consented to dismissal of the void indictment against petitioner. But petitioner was not told by the highest New York court until June 6, 1961, in a matter of first impression there, that it declined to follow the 1935 decision of this Court, and ruled for the first time that the District Attorney (then deceased) responsible for petitioner's eleven year incarceration was an agent of the City, not of the State, as petitioner rightfully believed the law to be theretofore (*Fisher* v. *State*, 10 N. Y. (2d) 60). The period of limitations now urged by respondent as a bar to this action had then, of course, long since expired, as had the state statute of limitations, assuming *arguendo* that it was applicable on any theory.[11] The District Court noted this plainly inequitable consequence (208 F. S. 681, 682).

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[10] N. Y. City Administrative Code, Sec. 394 a 1.0.

[11] Doctrines of sovereign immunity can have no application to suits for invasion of Constitutional rights (*Sterling* v. *Constantin*, 287 U. S. 378, 393). Thus a local ordinance (or administrative regulation) can not deny rights created by the federal constitution (*Cooper* v. *Aaron*, *supra*, 358 U. S. 1, 16).

Thereafter it is unquestioned that petitioner labored diligently to procure jurisdictional legislation enabling him to proceed in the state courts against the City, down to April 24, 1962 when, after passing the state legislature, it was vetoed at the very instance of the respondent City itself who saw no "moral or legal obligation" to petitioner for his eleven years imprisonment under proceedings that were admittedly *coram non judice*.

The respondent City conducted its unfounded prosecution of petitioner in the name of the "People of the State of New York" under "state" law and, acting through its own Court of General Sessions, incarcerated him for a period of eleven years in a "state" penitentiary from which he was then released and placed on nineteen years probation by a "state" board of parole. In this period this Court, in *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, squarely held that the District Attorney responsible for this deprivation of due process and unconstitutional restraint was, for these very purposes, an agent of the State, not the City, and the City obviously did nothing to disabuse that view of the law. Then, when petitioner sued the State, this rule of law was flatly rejected by its highest court and, for the first time, the District Attorney responsible was then held to be solely an agent of the City. This respondent then asserted its own self-imposed administrative barrier of a one year time limitation against this suit on the 14th Amendment which, of course, had then long since expired. All then knew, also, that the District Attorney and his Assistant who was responsible for the void indictment and conviction were then long since deceased (cf. *Bell* v. *Hood*, *supra*, 327 U. S. 678).

This Court will not hesitate to strike down a municipal enactment that abridges the constitutional guarantees of the

14th Amendment (*Hague* v. *C. I. O.*, *supra*, 307 U. S. 496; *Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*, 237 U. S. 278). To hold that this suit on the 14th Amendment could be abridged or barred by an administrative limitation imposed by the respondent itself is plainly untenable (cf. *Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*).

Thus the respondent City plainly is estopped to raise its own administrative time limitation of one year to this suit against it upon a federal Constitutional claim of denial of due process (*Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231) and it is immaterial whether petitioner's delay was due to a "mistake" of law or not. Petitioner followed the law established by this Court in *Spielman Motor Co.* v. *Dodge*, *supra*, 295 U. S. 89, upon a string of New York precedents, until the highest New York court repudiated that decision on June 6, 1961 (*Fisher* v. *State*, *supra*, 10 N. Y. (2) 60) and held that the City and not the State was responsible for his misfortune. By then it was too late under the City's own administrative time limitation, or even under the state statute of limitations, for petitioner to pursue the City for relief under state law. His diligence since then in seeking relief from the state legislature is both demonstrated and unquestioned. Yet petitioner was finally thwarted in securing that relief at the very instance of the respondent City itself, acting through its Mayor.

It is a principle "older than the country itself" that "no man may take advantage of his own wrong" (*Glus* v. *Brooklyn Eastern District Terminal*, *supra*, 359 U. S. 231, 232; *Schroeder* v. *Young*, 161 U. S. 334; *Insurance Co.* v. *Wilkinson*, 13 Wall. 222, 233). Thus despite the delay in bringing suit petitioner is entitled to have his case tried

on the merits, it appearing that respondent so conducted itself that petitioner, acting in good faith, was delayed in the bringing of this action (*id.*).

(e) State court limitations can not control assertion of a federal Constitutional right in a federal court sitting in the state.

The absence of specific directions from Congress in authorizing suits under the Constitution does not necessarily lead to the result that state statutes of limitation should apply to Fourteenth Amendment suits (*McAllister* v. *Magnolia Petroleum Co.* 357 U. S. 221, 227-9). This is one nation wherein the Constitutional guarantees apply equally in all the states. Obviously federal courts can not subject parties claiming Constitutional rights to variant state statutes of limitation. Thus to enforce a single state statute (or a local municipal regulation) in a suit of this character would disrupt all this (*id.*). Where resort is had to a federal court, not on diversity grounds but because a federal right is claimed, state court limitations do not control a federal court sitting in the state (*Angel* v. *Bullington*, 330 U. S. 183, 192; *Holmberg* v. *Ambrecht*, 327 U. S. 392)[12].

VII. CONCLUSION.

As was said in the similar case of *Hoffner* v. *New York*, *supra*, 207 N. Y. Misc. 1070, 1072:

> "The claimant has been humiliated, degraded, shamed and suffered a loss of reputation and earn-

[12] Where this Court reversed the Second Circuit Court of Appeals for erroneously applying the 10-year New York Statute of Limitations (Civil Practice Act Sec. 53(2)) in a suit under a federal statute and plaintiff's delay was, as here, a justifiable one.

ings. For this he must be paid and for this money damages can be compensatory. But all the wealth of the State of New York could not compensate the claimant for the mental anguish suffered through nearly twelve years of false imprisonment, under the impression he would be there for the rest of his life. How can a man be repaid who has been branded a murderer and whose only hope is an early death to release him from the sentence erroneously imposed on him? For this, any award is bound to be a mere token, but it should compensate as well as the medium allows."

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said Circuit Court had in case numbered and entitled on its docket No. 213, October Term, 1962, William Fisher, Appellant *v.* The City of New York, respondent, to the end that this case may be reviewed and determined by this Court as provided for by the Constitution and statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper

Respectfully submitted,

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Dated: March 4, 1963